Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF SBC COMMUNICATIONS INC.

SBC COMMUNICATIONS INC.

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SUMMARY*

In this Petition, SBC requests that the Commission reconsider three of its rulings concerning the method of calculating maximum rates applicable to pole and conduit attachments by telecommunications carriers pursuant to Section 224(e). First, the Commission should reconsider its decision to apply the Section 224(d) rate to a cable operator that is providing services other than cable service, such as Internet access service. This is clearly contrary to Section 224(d), which provides that it is only applicable to cable operators that "solely provide cable services." The Commission can accomplish its objective of encouraging expanded Internet service by applying the Section 224(e) rate, which would honor the statutory limitation. In addition, given that many services available through an Internet service are functionally equivalent to certain telecommunications services, applying Section 224(e) to both is the only reasonable conclusion.

Second, the Commission should reconsider its decision to double-count ILECs as "attaching entities" for purposes of charging them with an additional share of the non-usable space. The R&O claims that this result will implement an equal apportionment of costs in accordance with Congressional intent. However, ILECs are already responsible for a one-third statutory share and, by default, for the share allocated to those cable operators that are subject to Section 224(d) rates. It defies logic to claim, on the one hand, that what Congress intended was an equal apportionment of costs among all who benefit from the non-usable space; while, in effect, to require that the ILEC be responsible for two or possibly three shares.

* The abbreviations used in this Summary are defined in the body of this Petition.

Third, consistent with the intent of the pole attachment rules as a simple, expeditious process, utilities should be allowed to determine the average number of "attaching entities" on a state-wide basis, instead of being required to use an unnecessarily complex process to count "attaching entities" in multiple irregular zones that are purportedly based upon the Census Bureau classifications. The record in this proceeding does not contain any evidence that there is any value in requiring these multiple zones, much less that any benefit exceeds the cost of this new, burdensome regulation. In addition, those utilities that elect to calculate rates in multiple zones rather than on a state-wide basis, should be allowed to delineate their own reasonable zones because the zones selected by the Commission lack any rational basis. For example, while the R&O purports to adopt three separate and distinct zones (urban, urbanized and rural), it fails to recognize that "urbanized areas" are merely a subset of "urban areas."

This Petition also seeks clarification of three other aspects of the R&O. First, as in the case of the R&O's ruling on dark fiber, the Commission should clarify that if an attachment previously used for providing solely cable service would, as a result of third party overlashing, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e).

Second, in order that utilities will know when to count a government agency as an "attaching entity," the Commission should clarify that a state-owned telecommunications network, and similar networks that are not used to provide telecommunications services on a common carrier basis, should not cause the state or other government agency to be counted as an attaching entity.

Third, to avoid future disputes, SBC requests that the Commission provide a clearer distinction between usable and non-usable conduit costs. Specifically, SBC suggests that the Commission clarify what would be considered usable costs as the cost of whatever material forms the walls of the individual ducts, whether that is polyvinyl chloride ("PVC"), concrete or some other material. The cost of that material would be usable space costs and the remainder of the costs of constructing the conduit system would be non-usable space costs.

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SBC Communications Inc. ("SBC")[1] hereby requests that the Commission reconsider and/or clarify certain aspects of the Report and Order ("R&O")[2] in the above-captioned proceeding.

In particular, this Petition asks the Commission to reconsider and/or clarify the R&O as follows:

(1) The Section 224(d) rate should not apply to a cable system with attachments that are not used "solely to provide cable service."[3] For example, a cable system that provides Internet access service or data services cannot be viewed as providing only cable service.

(2) The Commission should clarify that, just as in the case of dark fiber leasing,[4] an attachment previously used solely to provide cable service would become

[1] SBC Communications Inc. ("SBC") files this Petition on behalf of its subsidiaries, including Southwestern Bell Telephone Company ("SWBT"), Pacific Bell and Nevada Bell.

[2] FCC 98-20.

[3] 47 U. S. C. § 224 (d) (3).

[4] R&O, ¶ 73.

subject to the Section 224 (e) rate if the cable operator allowed a telecommunications carrier to overlash on its attachment.

(3) Given that an incumbent local exchange carrier ("ILEC"), as pole owner, is already responsible for over one-third of the non-usable space costs, the ILEC should not be double counted as an attaching entity, for purposes of allocating an additional share of non-usable space costs to the ILEC.

(4) In order that utilities will know when to count a government agency, the Commission should clarify that a government agency is not counted as an attaching entity by virtue of its use of attachments for a private telecommunications network.

(5) Utilities should be allowed to determine the average number of attaching entities on a state-wide basis, instead of a complex process of determining separate averages across multiple irregularly shaped zones throughout each state.

(6) The Commission should clarify the method of distinguishing the costs associated with usable and non-usable space in a conduit system because it is not clear what would be considered "the cost of the actual duct itself."[5] SBC submits that the estimated cost of the concrete, plastic or other materials that form the individual ducts should be considered usable space costs, and the remainder of the costs involved in constructing the conduit system should be considered non-usable.

By reconsidering and clarifying the R&O in the respects outlined above, the Commission will bring the R&O more closely in line with Section 224, as revised by the Telecommunications Act of 1996 (the "1996 Act"), and its intent of establishing a simple, predictable and expeditious procedure. Further, granting this Petition in the near future, along with a ruling in CS Docket No. 97-98, will enable utilities to complete their procedures for developing Section 224(e) rates well ahead of the February 2001 effective date.

[5] Carolina Power, et al. Reply Comments at 10.

I. SECTION 224(D) RATES SHOULD NOT APPLY TO CABLE SYSTEMS THAT DO NOT "SOLELY PROVIDE CABLE SERVICE."

The R&O rules that a cable operator that provides services other than cable service via its cable system would still qualify for Section 224(d)'s rates.[6] This ruling is contrary to the plain language of Section 224(d).

Section 224(d)(3) states that the Section 224(d) cable service rate applies to "any pole attachment used by a cable television system solely to provide cable service."[7] Contrary to the limiting language "solely to provide cable service," the R&O concludes that the Section 224(d) rate is applicable even when the cable operator provides a service other than cable service, such as, Internet access service. This conclusion ignores the express statutory limitation. If a cable operator uses its attachments to provide any service other than cable service, it is not entitled to the Section 224(d) rate.

The R&O provides a couple of reasons for applying the Section 224(d) rate to attachments used for both cable service and Internet service "[r]egardless of whether such commingled services constitute 'solely cable services' under Section 224(d)(3)."[8] First, the R&O indicates that the Commission wishes to encourage expanded Internet service. The second line of reasoning is a little difficult to follow. The R&O claims that it does not need to decide whether Internet service is a cable service or a telecommunications service in order to apply the Section 224(d) rate.[9] However, the R&O relies on its initial

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[6] R&O, ¶ 34.

[7] 47 U. S. C. § 224(d) (emphasis added).

[8] R&O, ¶ 34.

[9] Id.

conclusion in the Universal Service Order that Internet service is not a telecommunications service to conclude that it has authority to apply the Section 224(d) rate to noncable services pursuant to some purported general authority to ensure that pole attachment rates are just and reasonable.[10] These two reasons are insufficient to explain the failure to honor the statutory limitation "solely to provide cable service."

First, either of the two regulated rates should be sufficient to encourage expanded Internet service. It is not clear why the R&O assumes that it is necessary to apply the lower of the two regulated rates in order to accomplish this general Commission objective. Second, the Commission can respect the statutory limitation ("solely to provide cable service") only by applying the Section 224(e) telecommunications services rate. Third, the Commission does not have -- as the R&O contends -- general authority pursuant to Section 224(b)(1) to regulate the rates of all attachments by a cable system independent of the formulas in Section 224(d) and (e). Under Section 224(d), a cable system's attachments used solely to provide cable service are regulated using one method; and under Section 224(e), a cable system's telecommunications attachments are regulated using another method. The direction to regulate in Section 224(b) is given its meaning in subsections (d) and (e).[11] That meaning includes an express limitation on the services provided by attachments governed by the cable services rate. Therefore, assuming that the Commission has any authority to regulate the rates applicable to attachments that commingle cable service with other services that are neither cable

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[10] Id.

[11] Subsection (d) even starts "For purposes of subsection (b) of this section."

service nor telecommunications, it clearly has no authority to apply the cable service rate to such mixed use attachments, in contempt of the statutory limitation.[12]

Applying the telecommunications services rate also would be consistent with the Commission's previous decision to consider Internet access services provided by Bell Operating Companies ("BOCs") to be interLATA information services for purposes of Section 272 if they include a bundled, interLATA transmission component.[13] Similarly, the cable operator providing Internet access to its subscribers would be furnishing a bundled transmission component as part of its Internet access service. This transmission component is not merely cable service, and thus, assuming Section 224 applies at all, the Section 224(e), rather than the Section 224(d), rate should apply.

Further, some services available through an Internet service are functionally equivalent to certain telecommunications services. For example, transmission associated

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[12] The Commission relies on the Heritage decision for its conclusion that it has authority to regulate attachment rates beyond that granted by Section 224(d) and (e). R&O, ¶30 & n.122 (citing Texas Utils. Elec. Co. v. FCC, 997 F.2d 925, 934-35 (D.C. Cir. 1993)). However, having been decided before the 1996 Act, Heritage cannot be relied upon to reach a conclusion concerning the statutory intent underlying the 1996 Act. Prior to the 1996 Act, Section 224 did not contain express conditions regarding the services provided. In fact, the court in Heritage noted that there was no "express requirement that any such attachment be [used] solely for the purposes of transmitting video programming . . .." Id. at 932. In the 1996 Act, Congress furnished this express requirement by amending Section 224 to make the cable services rate applicable only to those attachments used "solely to provide cable service." Therefore, at a minimum, the R&O is in error in assuming that a cable operator's commingled provision of cable service and data transmission or other nonvideo broadband services can use attachments at the pre-existing cable services rate. Heritage did not construe Section 224(b)(1) to provide the Commission with some general authority over pole attachments; and thus, the R&O improperly extends the Heritage holding to a very different Section 224 that includes two regulated rate methods: one solely for cable service use and one for telecommunications. A cable operator's nonvideo broadband services certainly do not fit in the former, although they may fit into the latter, category.

[13] Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, 11 FCC Rcd 21905, ¶¶ 115-127 (1996) ("Non-Accounting Safeguards Order").

with electronic mail, file transfer capabilities, public and semi-private chat rooms, instant messaging and, especially, Internet telephony offer the capability to transmit "between or among points specified by the user, . . . information of the user's choosing, without change in the form or content of the information as sent and received."[14] For the sake of consistency with the intent of the statute, these two-way telecommunications transmission capabilities should trigger the application of the Section 224(e) telecommunications carrier rate.

As the Commission acknowledged in its Information Services/Internet NOI, "several companies now provide software that allows a voice conversation to be conducted over the Internet."[15] Recent announcements indicate that Internet telephony is going to grow very rapidly. For example, several companies have announced plans to offer the lowest long distance rates ever using Internet technology.[16] ICG Communications announced plans to serve 166 markets by the end of next year.[17] Cable operators are planning to provide Internet telephony via their cable systems as well. In December 1997, TCI announced its plans to begin offering Internet telephony by the end of next year.[18] Considering these and other developments, the Commission cannot

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[14] 47 U.S.C. § 153(43).

[15] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Services and Internet Access Providers, 11 FCC Rcd 21354 ¶ 316 (1996).

[16] The Dallas Morning News, March 19, 1998, at 2D (IDT Corp, 5 cents; ICG Communications, 5.9 cents; I-Link, 4.9 cents).

[17] Id. Telecommunications Reports, March 16, 1998, at 33. See also Telecommunications Reports, March 23, 1998, at 35.

[18] "Cheap calls via the Internet could revolutionize phone service", USA Today, February 10, 1998, Money Section, p. 1B. (from http://archives.usatoday.com).

reasonably construe Section 224(d) to be applicable to a cable system that provides Internet telephony or telecommunications-like non-cable services. It is not reasonable for the Commission to treat differently two pole attachments that are being used to provide equivalent or similar transmission capabilities simply because one belongs to a carrier and the other belongs to a cable operator. Accordingly, the Commission should reconsider this ruling and apply the Section 224(e) telecommunications rate to a cable system's attachments used for such purposes other than cable service.

II. WHEN A CARRIER OVERLASHES ON A HOST CABLE OPERATOR'S ATTACHMENT, THE SECTION 224(E) RATE SHOULD APPLY.

In its discussion of the application of Section 224 to the leasing and use of dark fiber, the R&O states that,

> [I]f an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on services provided over pole attachments.[19]

The discussion of third party overlashing in paragraphs 65-69 of the R&O does not contain a similar statement concerning the effect of a telecommunications carrier overlashing its line(s) on a "host" attachment previously used solely to provide cable service. In that case, as in the case of a dark fiber lease, the cable operator's attachment would no longer be used solely to provide cable service because it would also support the overlashing telecommunications carrier's line(s). Hence, the Commission should clarify

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[19] R&O, ¶ 73 (emphasis added).

that the Section 224(e) rate would apply to such cable operator, whether it is leasing dark fiber or allowing a third party to overlash to provide telecommunications services.

Therefore, the Commission should clarify the R&O by ruling that if an attachment previously used for providing solely cable service would, as a result of third party overlashing, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e).

III. ILECS, WHICH ARE ALLOCATED AT LEAST A ONE-THIRD SHARE AS POLE OWNERS, SHOULD NOT BE COUNTED AS ATTACHING ENTITIES.

In ruling that ILECs are counted as "attaching entities," the R&O only addressed American Electric's argument. The Commission should consider other arguments such as those of SBC.[20] American Electric argued that ILECs should not be counted because ILECs are excluded from the definition of "telecommunications carrier" for purposes of Section 224, and thus, their attachments are not subject to Section 224.[21] Accordingly, since they are not capable of having "pole attachments" for purposes of Section 224, they should not be considered "attaching entities." SBC supports American Electric's argument, and urges the Commission to reconsider, especially in light of other arguments that the R&O failed to address.

> In rejecting American Electric's argument, the R&O noted that
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> Congress concluded that the unusable space "is of equal benefit to all entities attaching to the pole" and intended that the associated costs be apportioned "equally among all such attachments."[22]

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[20] SBC Comments at 21-24; SBC Reply Comments at 14-15.

[21] American Electric Comments at 41.

[22] R&O, ¶ 49 (quoting Conference Report No. 104-458, 104th Cong., 2d Sess., at 206) (emphasis added).

Further, the R&O stressed that its conclusion recognizes that the ILEC pole owner "uses and benefits from the unusable space in the same way as the other attaching entities."[23]

SBC is in full agreement with the intent of Congress and the R&O to recognize that all who use the pole for wire communication benefit equally from the nonusable space. However, SBC does not agree that this requires ILECs to be counted as attaching entities. ILECs already receive what will be in most cases more than their equal share by virtue of, among other things, the one-third share they automatically receive in Section 224(e)(2). In order to carry out the intent of Congress that the unusable space be divided equitably among all who enjoy its benefits, the Commission needs to consider the one-third share allocated to pole owners, as SBC and other commenters argued.[24] Otherwise, ILECs would receive much more than an equal share because they would be allocated one-third by the statute and an additional pro rata share as an "attaching entity." As a practical matter, the ILEC is responsible for the share allocated to those cable operators that are subject to Section 224(d) rates. It defies logic to claim, on the one hand, that what Congress intended was an equal apportionment of costs among all who benefit from the nonusable space; while, in effect, to require that the ILEC be responsible for two or possibly three shares.

In light of this inequitable result and the fact that ILECs are excluded from the definition of "telecommunications carriers" capable of having attachments for purposes

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[23] R&O, ¶ 51 (emphasis added).

[24] See, e.g., SBC Comments at 21-24; SBC Reply Comments at 14-15; Ameritech Comments at 11-12; Bell Atlantic Comments at 6 & n. 13; GTE Comments at 3, 11; Ohio Edison Comments at 39; USTA Reply Comments at 8-9.

of Section 224, the Commission should reconsider this ruling and conclude that ILECs should not be counted as attaching entities.

IV THE COMMISSON SHOULD CLARIFY WHEN GOVERNMENT AGENCIES WOULD BE COUNTED AS "ATTACHING ENTITIES."

The R&O indicates that government agencies will only be counted as attaching entities to the extent they provide cable or telecommunications service.[25] This would be reasonably clear, except that the R&O proceeds to explain further as follows:

> We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting.[26]

Because the list of types of attachments not counted is relatively narrow, it leaves open the possibility that other attachments that fit neither the cable/telecommunications service nor the "public use" category might also need to be counted. In particular, some state and local governments operate their own private telecommunications networks. SBC requests that the Commission clarify that a state-owned telecommunications network, and similar networks that are not used to provide telecommunications services on a common carrier basis, should not cause the state or other government agency to be counted as an attaching entity.

V. UTILITIES SHOULD HAVE THE OPTION OF DETERMINING THE AVERAGE NUMBER OF ATTACHING ENTITIES ON A STATE-WIDE BASIS.

Presented with a variety of alternative methods of determining the number of attaching entities, the Commission selected an alternative that had not been presented: it

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[25] R&O, ¶ 54.

[26] Id. (emphasis added).

ruled that each utility should determine the average number of attaching entities in each of three geographic areas it serves: (1) urban, (2) urbanized and (3) rural areas, as defined by the United States Census Bureau.[27]

SBC requests that this ruling be reconsidered to allow a utility the option of determining the average number of attaching entities on a state-wide basis, rather than in multiple Census Bureau geographic zones in each state.[28] While the R&O appears to require the utility's service area to be divided into three types of geographic areas, the utility would be required to identify and collect attachment data within the irregular boundaries of numerous urban and rural areas in each state.

Determining averages in multiple zones is unnecessarily complex and burdensome.[29] And, the record in this proceeding does not contain any evidence that there is any value in requiring these multiple zones, much less that any benefit exceeds the cost of this new, burdensome regulation. This new requirement is also inconsistent with the use of state-wide figures for other components of the formula, such as depreciation and maintenance. To illustrate, while maintenance could be split among multiple urban and rural zones using burdensome, expensive accounting procedures and the rate for each zone would reflect a more accurate maintenance component, the added

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[27] R&O, ¶¶ 77-78.

[28] See SBC Comments at 27; SBC Reply Comments at 23-24.

[29] The Commission has underestimated by a wide margin the burden of the new requirements. See 63 Fed. Reg. 12013 (March 12, 1998). For example, the Commission's estimates do not even include any burden associated with the paperwork necessary to comply with the requirement to determine the count of attaching entities in multiple, irregular zones. Proper evaluation of not only the benefits, but also the costs of such new, burdensome requirements is a much more important task than before in view of the Commission's obligation pursuant to Section 11 of the 1996 Act to undertake an "attic-to-basement" review to justify the burden of all regulations every two years.

cost and complexity is not justified. In fashioning the original pole attachment formula, the Commission strived to use simple, predictable procedures. For example, the Commission adopted an administrative component that uses a proration method that is easy to apply even though it does not produce a precise figure for administrative expenses actually associated with poles. The Commission explained its decision on the administrative component in part as follows:

> [T]he components of the formula should be predictable and retain a level of certainty that will facilitate negotiated settlements based on our formula. Indeed, Commission procedures and calculations should remain simple and expeditious and not modelled on ratemaking or complex tariff proceedings. The commenters have proposed a number of additions, deletions, or other modifications of the various components of the distribution ratio which substantially complicate the methodology. Without drawing a conclusion on the relative merit of these proposals, we conclude that a modified distribution ratio does not further our goal of a simple, predictable formula . . .Therefore, since the proposed distribution ratio is not only more complicated than a total expense to total plant ratio, but is also not demonstrably superior to the total expense to total plant ratio, we will adopt . . . the ratio of total administrative and general expenses to total plant investment.[30]

The Commission should adopt a similar, streamlined approach to the determination of the average number of attaching entities. If average state-wide accounting figures for items such as maintenance and administrative costs are adequate, average state-wide counts of attachments per pole should also be sufficient. Not only is the simpler approach more consistent with the history of the Commission's pole attachment regulations, it also better

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[30] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, 2 FCC Rcd 4387 ¶ 37 (1987) ("1987 Report and Order") (emphasis added).

reflects the 1996 Act's deregulatory national policy framework.[31] The Commission should not impose complex procedures for determining the average number of attaching entities in multiple zones in each state if a much less burdensome single average per state is sufficient.

In addition to considering that these complex procedures are entirely unnecessary and unjustifiably burdensome, the Commission should take into account that the use of multiple zones will result in higher rates in the 4,000 towns across the U.S.[32] that qualify as "urban areas" and in rural areas. Rural areas will have the lowest average number of attaching entities, and thus, the highest rates. Higher pole attachment rates will discourage deployment in these 4,000 towns and in the rural areas and impose higher costs per subscriber than in urbanized areas.[33] This is an additional factor that weighs against requiring separate zones.

Before a utility could even begin to count attaching entities, it must determine the location of the irregular boundaries between the Census Bureau urban/rural zones. However, an initial problem is presented by an apparent contradiction between the R&O and the Census Bureau's census geography. The R&O requires separate averages for the following three geographic areas: "[1] rural, [2] urban and [3] urbanized service areas."[34]

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[31] Conference Report No. 104-458, 104th Cong., 2d Sess., at 113.

[32] These are the 4,000 towns with a population of 2,500 or more that do not qualify as "urbanized areas" according to the Census Bureau.

[33] Cf. 47 U. S. C. § 254(b)(3) ("Consumers in all regions . . . including those in rural . . . areas should have access to telecommunications . . . services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas.")

[34] R&O, ¶ 77.

However, in "A Guide to State and Local Census Geography" published by the Census Bureau in June 1993 (the "Guide"), excerpts of which are attached as Exhibit "A", it is clear that these three areas are not separate and distinct zones. In fact, according to the Guide, "'urban' comprises all territory, population, and housing units in UA's [(urbanized areas)] and in places . . . of 2500 or more people outside UAs."[35] According to the Guide, UAs are merely a subset of the Census Bureau's "urban" territory. Therefore, it is very unclear how a utility should comply with a requirement to establish separate averages and rates for (1) urban and (2) urbanized areas.

In effect, the UAs include the cities and most suburban areas, whereas, the only additional areas considered "urban" are incorporated or designated places outside of the UAs that have a population of 2,500 or more. Given that the Notice of Proposed Rulemaking (the "Notice") considered requiring separate presumptions for "urban, suburban and rural areas," it is not at all clear why the R&O adopted the overlapping "urban" and "urbanized areas" from the Census Bureau. The Notice's urban and suburban areas would both be included in the Census Bureau's "urbanized areas." The remainder of the "urban" areas (those outside of the UAs) consist mostly of about 4,000 small cities and large towns that are not suburbs.[36] The geographic zones adopted in the R&O are quite different from those that the Notice described. The R&O has failed to explain the logical basis for its geographic zones and the correlation

[35] Guide at 5. Information on the Census Bureau's Internet web site (www.census.gov) confirms that the information in the June 1993 Guide is still accurate regarding the urban and rural geographic area definitions. For examples, Chapter 12 of the Geographic Areas Reference Manual available at www.census.gov/geo/www/garm.html provides a 24-page description of "The Urban and Rural Classification."

[36] See Geographic Areas Reference Manual, supra note 35, chap. 12, at 16. See also Guide, at 14.

between these zones and those discussed in the Notice. Nor has the R&O provided sufficient justification to require geographic zones at all.

Besides, the fact that the "urban" and "urbanized" areas are not mutually exclusive causes the R&O's procedure for determining the average number of attaching entities to be inherently unclear and arbitrary. The R&O appears to adopt three separate and distinct geographic zones, but, the R&O fails to recognize that two of the three zones have a very significant overlapping area that includes most of the 405 urbanized areas in the country and all major metropolitan areas. Even the mechanics of the procedure are illogical because the attachments in a UA would be counted twice; once to establish the average in that UA and again to establish the average in the larger, though widely dispersed, "urban" territory that includes that UA. Aside from the initial confusion created by the R&O's contradiction of the Census Bureau's geography, the irregular boundaries of the UAs and rural areas will make it very difficult to determine the average number of attaching entities. Designing and implementing a process for staying within the imaginary, irregular boundaries of the UAs to count attaching entities will be extremely difficult.

Consistent with the long-standing goal of using a simple, expeditious and predictable process to regulate pole attachments, and given that the burden of a complex process of determining rates in multiple rate zones is not outweighed by any unexplained benefit that the Commission expects from this cumbersome process, the Commission should reconsider and give utilities the option of determining the average number of attaching entities on a state-wide basis. In addition, those utilities that elect to calculate rates in multiple zones rather than on a state-wide basis, should be allowed to delineate

their own reasonable zones because the zones selected by the Commission are too difficult to follow and do not make any sense in light of the Census Bureau definitions.

VI. THE COMMISSION SHOULD CLARIFY THE METHOD OF DISTINGUISHING USABLE AND NON-USABLE SPACE IN THE CONDUIT SYSTEM.

Although it is difficult to draw analogies between poles and conduit, the R&O identified some parallels between the two, and on that basis, adopted a distinction between usable and non-usable space.[37] A pole has a buried length and a portion that one must climb to reach the usable space. In the case of conduit, costs were incurred to reach "the level down to which one must go"[38] in order to place the conduit securely below the ground.[39] Instead of measuring distance, as is done with poles -- since there is no support structure between the ground level and the conduit system -- the R&O differentiates the usable and non-usable conduit space primarily based on the type of costs incurred (and secondarily based on the reservation of a maintenance duct).[40] This is a reasonable approach to a difficult task.

However, to avoid future disputes on this issue, SBC requests that the Commission provide a clearer distinction between usable and non-usable conduit costs. In particular, if, as the R&O states, the non-usable costs are the "costs involved in the construction of the system"[41] and "generally include trenching, excavation, supporting

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[37] R&O, ¶¶ 108-110.

[38] Id., n. 355.

[39] Id.

[40] Id., ¶ 110 & n. 355.

[41] Id., ¶ 110.

structures, concrete and backfilling,"[42] then SBC is not certain what costs would be considered usable. The R&O does not describe the costs that would be considered usable. However, the R&O indicates that the source of this concept is Carolina Power, et al. ("Carolina Power"), and Carolina Power described the distinction as follows:

> Using current replacement costs makes the determination of the costs of usable versus unusable space extremely easy. The usable space in a conduit is the cost of the actual duct itself. In order to price duct, it is very easy to determine current retail costs of the ducting. The duct is clearly the only part that is usable – the ditch, concrete and surrounding materials all exist solely to support and protect the duct which houses cables and wires. The cost of the ducts, being the usable space, can then be deducted from the total cost of the conduit, on a per-foot basis, to complete the calculation of the maximum rate under the statute.[43]

Given that the R&O appears to have adopted Carolina Power's concept,[44] the usable costs are the costs of the duct itself. However, because the R&O's description of the costs that are considered non-usable appears to encompass virtually all of the construction costs, it is not entirely clear what costs are considered usable. For example, the cost of the actual duct itself might approximate zero if the plastic or concrete forming the walls of the duct is not considered usable cost. Therefore, SBC suggests that the Commission clarify what would be considered usable costs as the cost of whatever material forms the walls of the individual ducts, whether that is polyvinyl chloride ("PVC"), concrete or some other material. The cost of that material would be usable space costs and the remainder of the costs of constructing the conduit system would be

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[42] Id., n. 355 (emphasis added).

[43] Carolina Power et al. Reply Comments at 10, cited in R&O, n. 356 (emphasis added).

[44] Id., ¶¶ 108 n. 348, 110 n. 356.

non-usable space costs.[45]

SBC requests that the Commission provide general guidance on this distinction between usable and non-usable conduit space, so that utilities will be able to avoid future disputes generated by the potential vagueness of the R&O as applied to some LEC facilities.

VII. CONCLUSION.

SBC respectfully requests that the Commission reconsider three of the R&O's rulings. First, cable operators that do not "solely provide cable services" should not qualify for Section 224(d)'s cable service rate. Second, since the ILEC, as pole owner, already receives two shares of the non-usable space costs – the one-third statutory share and the "cable-only" operator's share – it should not be allocated a third share by being counted as an "attaching entity." Third, consistent with the intent of the pole attachment rules as a simple, expeditious process, utilities should be allowed to determine the average number of "attaching entities" on a state-wide basis, instead of being required to use an unnecessarily complex process in multiple irregular zones that are purportedly

[45] The ratio of usable and non-usable could be determined using any reasonable method of estimating the two categories of costs, such as recent cost data or an examination of invoices from recent jobs. Then

based upon the Census Bureau classifications. Further, SBC respectfully requests that the Commission clarify as requested in this Petition the impact of dark fiber leasing on the cable service rate, the type of government agency attachments that would be counted as attaching entities and the method of distinguishing usable and non-usable costs in a conduit system. Prompt clarification of these points will permit development of clear procedures in time to be implemented when the carrier rate goes into effect.

Respectfully Submitted,

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EXHIBIT "A"

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A Guide to State and Local Census Geography

See page 4 & 5

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Ronald H. Brown, Secretary

Economics and Statistics Administration

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